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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROBERT W. HUISKAMP

Petitioner,

vs.

NEW YORK CONNECTING RAILROAD COMPANY and HORIZON TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

FROM A DECISION OF THE

THIRD CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Res judicata - effect of bankruptcy court order on strangers to the proceedings.

In general, the case presents the question of the power of a bankruptcy court order to bind persons and interests other than the bankrupt and its assets. In particular, can an order of a bankruptcy court authorizing the bankrupt to make a tender offer to bondholders of a non-bankrupt subsidiary affect the rights between the subsidiary and its bondholders? Specifically, can that order change the status of the bondholders as judgment creditors of the subsidiary, and become res judicata as to that issue, without the presence or participation in the bankruptcy proceedings by the bondholders?

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PETITION FOR WRIT OF CERTIORARI

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert W. Huiskamp, the petitioner, prays that a writ of certiorari issue to review the judgment of the Third Circuit Court of Appeals entered in this case on November 10, 1986.

OPINIONS BELOW

On March 4, 1986 the United States District Court for the Eastern District of Pennsylvania entered its unreported opinion. A copy of that opinion is attached in Appendix A, pages 1 to 11. That judgment was timely appealed to the Third Circuit Court of Appeals. On November 10, 1986, the Third Circuit Court of Appeals entered its unreported opinion affirming the District Court. A copy of that opinion is attached in Appendix A , pages 12 to 16. A timely petition for rehear-

ing was denied on December 9, 1986. A copy of that denial is attached in Appendix A, page 17.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on November 10, 1986. A timely petition for rehearing was denied on December 9, 1986. (Appendix A, page 17). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

Can an order of a bankruptcy court authorizing the bankrupt to make a tender offer to bondholders of a non-bankrupt subsidiary affect the rights between the subsidiary and its bondholders? In particular, can that order change the status of the bondholders as judgment creditors of the subsidiary, and become res judicata as to that issue, without the presence or participation in the bankruptcy proceedings by the bondholders?

STATEMENT OF THE CASE

The petitioner was a bondholder of New York Connecting Railroad Company ("NYCRR"), a wholly owned subsidiary of Penn Central Railroad Company ("Penn Central"). NYCRR owned a bridge linking southeastern rail routes with the Sunnyside yard in the Bronx. NYCRR had issued bonds to finance the bridge, and the bondholders held a first mortgage on the bridge. A trustee was named to act for the bondholders to protect their rights under the first mortgage (the "Trustee").

The bridge (and connecting track) was leased from NYCRR by Penn Central. In 1970, Penn Central filed a petition in bankruptcy and discontinued lease payments to NYCRR. NYCRR was thereafter unable to make the bond coupon payments, and defaulted. The Trustee took no action until 1976, but then obtained a consent judgment in the United States District Court for the Southern District of New

York against NYCRR on behalf of the bondholders for the outstanding bond indebtedness.

The rail assets of NYCRR were conveyed to Conrail in 1976 in return for a right to receive a pro rata part of the award in the Valuation Case, so the judgment could not be enforced until the proceeds from the Valuation Case were received by NYCRR.

In 1979, while the Valuation Case was still proceeding, Penn Central proposed a tender offer for the NYCRR bonds. As a part of Penn Central's petition, an agreement was entered between Penn Central, NYCRR and the Trustee, which contained the following language:

> "8. Treatment of bonds not acquired by Penn Central. In the event that Penn Central acquires some but not all of the New York Connecting bonds pursuant to the tender offer, the amounts which may be due holders of New York Connecting bonds that are not so acquired shall be satisfied,

> as provided in the First Mortgage and subject to the provisions of Paragraph 6 of this agreement, out of the proceeds of the recovery of the New York Connecting in the Valuaton Case and any other assets of New York Connecting available for that purpose. To the extent that such amounts are not so satisfied in full, they will be entitled to be satisfied as unsecured claims included within Class M of the Plan by means of the issuance of common stock and certificates of beneficial interest."

The Penn Central bankruptcy court approved the petition and made Order No. 4003 which authorized Penn Central to make the tender offer. That order approved the agreement between Penn Central, NYCRR and the Trustee. Penn Central made the tender offer and acquired most of the NYCRR bonds. The petitioner did not tender his bonds, and remained an NYCRR bondholder.

In 1980, the Valuation Case was settled, and NYCRR received the principal amount of the bonds plus 8% interest from the date of the transfer to Conrail. NYCRR then offered the Trustee the principal amount of the bonds plus the amount of the coupons (2-7/8%). After

initially refusing to accept that amount, and demanding the principal plus 8%, the Trustee later agreed to accept the principal amount plus 2-7/8% interest, and tendered that amount to the NYCRR bondholders.

The petitioner refused to accept that amount, contending that he was entitled to the amount NYCRR received from the Valuation Case. The Trustee represented that the bond indenture limited the petitioner to the coupon rate. The petitioner contended he was a judgment creditor and should receive the rate of interest on New York judgments. The difference was approximately $60,000. When the Trustee and NYCRR refused to pay the judgment amount, the petitioner brought an action in the United States District Court for the Eastern District of Pennsylvania, basing jurisdiction on diversity of citzenship between the parties pursuant to 28 U.S.C. §1332.

The District Court granted a motion for

summary judgment on the ground of res judicata, holding that the bankruptcy order approving the Penn Central tender offer constituted a final determination that the bondholders were entitled to the coupon amount. The court reasoned that the order approved the agreement between Penn Central, NYCRR and the Trustee which contained the language of paragraph 8, and under that language the bondholders were only entitled to receive the 2-7/8% coupon rate, not the judgment rate of interest.

The Third Circuit Court of Appeals affirmed the decision, holding that the Penn Central bankruptcy court order was res judicata on the rights of the bondholders against NYCRR, thereby terminating the bondholder's judgment creditor status and rights, and returning them to bondholder status.

REASONS FOR GRANTING WRIT

The decision that a bankruptcy order may affect the rights between non-participating

bondholders and a non-bankrupt subsidiary transports the doctrine of res judicata far beyond the limits which the Supreme Court has imposed. The Supreme Court has consistently held that in order to apply the doctrine of res judicata, certain fundamental elements must be present, including:

(A) The party to be bound must be before the court in the first tribunal, either in person or by an authorized representative who had the power and motivation to, and did, represent the interests of the party to be bound; and

(B) The decision made in the first tribunal must be a final judgment in a case where the object was to decide the issues sought to be determined against the party to be bound, and which did decide those issues adversely to the party to be bound.

In the present case, these elements are not present. The Penn Central bankruptcy court was

considering a petition by Penn Central to authorize a tender offer by Penn Central to the NYCRR bondholders. The jurisdiction of the bankruptcy court was solely over Penn Central and its assets. NYCRR was not in bankruptcy and was not before the court. NYCRR's bondholders clearly were non-participants in the Penn Central bankruptcy proceedings. The order approved the tender offer by Penn Central, but did not consider or decide that the NYCRR bondholders were required to change their judgment creditor status, or lose their judgment rights against NYCRR.

1. Res Judicata Cannot Be Applied Unless the Same Claim Was Previously Fully and Finally Litigated.

In concluding that res judicata precludes the petitioner from asserting his rights as a judgment creditor, the opinions below held that the Penn Central bankruptcy order constituted a final judgment as to the rights be-

tween NYCRR and the bondholders, even though neither was before the court, because the order approved the agreement between Penn Central, NYCRR and the Trustee, which included the language in paragraph 8. In applying the doctrine of res judicata to the present facts, the opinions below have come into conflict with well-established Supreme Court rules and decisions.

First, res judicata operates only in cases where the court has jurisdiction of the parties and the subject matter. Cromwell v. County of Sac, 94 U.S. 352, 356; 24 L.Ed. 195 (1876); Smith v. McCool, 83 U.S. 560, 561; 21 L.Ed. 324 (1872). The proper jurisdiction of a bankruptcy court is limited to determinations concerning the bankrupt and the bankrupt's property consequently the res judicata effect of those determinations applies only to the bankrupt and its assets. Goldsmith v. M. Jackman &

Sons, Inc., 327 F.2d 184 (10th Cir. 1964).

In the present case, however, the opinions below have given res judicata effect to a bankruptcy court order as between two parties over whom the bankruptcy court had no jurisdiction, either personally or as to the subject matter. The Penn Central bankruptcy court had jurisdiction over Penn Central and its assets only. Even assuming that the bankruptcy court order ruled on the judgment creditor status of the bondholders, that would not have res judicata effect. When a court incidentally determines a matter it would not have had jurisdiction to decide in the first instance, that incidental determination is not accorded res judicata effect. Arenas v. United States, 197 F.2d 418 (9th Cir. 1952); United States v. Silliman, 167 F.2d 607, 615 (3rd Cir. 1948) cert. den. 335 U.S. 825.

Second, in order for res judicata to bar a subsequent suit, the same issues must have been

tendered for decision and decided by the court. United States v. International Building Co., 345 U.S. 502, 504-505; 97 L.Ed. 1182 (1952). Where the prior action was not intended to determine the question at issue in the subsequent action, res judicata will not bar the subsequent action. Ash Sheep Co. v. United States, 252 U.S. 159, 170; 64 L.Ed. 507 (1919) ["A judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered"]. In general, the object of both actions must be the same to justify the application of res judicata, and an adjudication in bankruptcy is limited to determining the rights in the bankrupt's property, so it is not res judicata as to the facts or subsidiary questions leading to that determination. Gratiot County State Bank v. Johnson, 249 U.S. 246, 248; 63 L.Ed. 587 (1919); Mason v. Williams, 213 U.S. 453, 455;

53 L.Ed. 199 (1909).

The purpose of the bankruptcy petition was to authorize Penn Central's tender offer. There was no reason for the bankruptcy court to determine or change the judgment creditor status of the NYCRR bondholders. The issue in the second suit (whether the bondholders are judgment creditors) was never discussed in the bankruptcy court order. The only possible mention of such an issue is the phrase "as provided in the First Mortgage" in paragraph 8 in the agreement between Penn Central, NYCRR and the Trustee, which the bankruptcy court approved for Penn Central. That could hardly put in issue the status of the bondholders as judgment creditors of NYCRR.

Third, the petitioner was clearly not present, therefore he would be bound only if the Trustee was a party and entitled to represent him in that proceeding. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597;

92 L.Ed. 195 (1948). Further, only if the Trustee asserted the same interest as the petitioner, with the same motivation to do so, could the petitioner be bound. Litchfield v. Goodnow, 123 U.S. 549, 550-551; 31 L.Ed. 193 (1887).

The trust indenture specifically precluded the Trustee from compromising the rights of the bondholders in a bankruptcy proceeding (Article 7, Section 15), and unless the Trustee was authorized to represent the petitioner, a decision against the Trustee could not bind the petitioner. Gratiot County State Bank v. Johnson, supra at 248; see Restatement of Judgments 2d, §42(1)(b).

Finally, the opinions below appear to assume and accept that the Trustee executed the agreement to protect the rights of the bondholders who accepted the tender offer, but in doing so agreed that non-tendering bondholders lost their judgment creditor rights. If that

is the effect of the Trustee's acts, there was a conflict in the representation of both groups by the Trustee and a failure of consideration as to the non-tendering bondholders. Where the prior representation is inadequate as a result of such conflict, res judicata effect to the prior proceeding will be denied. Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir.) cert. den. 434 U.S. 832 (1977); Restatement of Judgments 2d, §42(1)(d) and (e). In general, where there is doubt about the quality, extensiveness or fairness of procedures followed in the prior litigation, res judicata effect will be denied to that litigation. Montana v. United States, 440 U.S. 147, 164 fn. 11; 59 L.Ed.2d 210 (1978).

In a similar situation in the same bankruptcy proceeding, a New York federal district court refused to give res judicata effect to a class action suit when an individual Penn Central shareholder not part of the class

action later brought suit. In Robinson v. First National City Bank, 482 F.Supp 92 (S.D.N.Y. 1979) several Penn Central shareholders filed a class action against banks which had offered misleading information to the shareholders in a restructuring of the railroad. The same shareholders also filed a claim in the bankruptcy proceedings. In 1978, the bankruptcy court approved a final plan of reorganization, which determined and finally resolved the issues raised in the bankruptcy claim. The banks then moved to dismiss the class action lawsuit on res judicata grounds. The court held that as to the named plaintiffs, the reorganization plan determined the class action issues and was res judicata; as to other members of the class, however, the bankruptcy reorganization had no res judicata effect. The court found that the shareholders could be bound in one of two ways: (a) by in rem reorganization jurisdiction or (b) by representa-

tive jurisdiction through the named plaintiffs. The court held that neither basis for jurisdiction was applicable because (a) the claims were not against the debtor's assets, but against the banks which participated in the restructuring and (b) the named parties did not have the right to represent the remaining class members.

The same lack of jurisdiction or right of representation exists in the present case, since the original bankruptcy approval was merely intended to apply to Penn Central and its assets, the petitioner was not present, the Trustee did not have power to appear for the petitioner or compromise his rights, and the present suit involves substantially different claims regarding the petitioner's status as a judgment creditor of NYCRR and claims against the Trustee.

2. Res Judicata is a Doctrine to Permit Fairness, Not to Defeat Claims.

A person is not bound by a judgment in personam in litigation to which he is not a party or served with process. Pennoyer v. Neff, 95 U.S. 714; 24 L.Ed. 565 (1877); Hansberry v. Lee, 311 U.S. 40 (1940). Judicial action enforcing a judgment against the person or property of the absent party is not consistent with Fifth Amendment due process. Postal Telegraph Cable Co. v. Newport, 247 U.S. 464; 62 L.Ed. 1215 (1917). Here, the petitioner was not a party to the bankruptcy proceedings or the agreement by Penn Central, NYCRR and the Trustee.

The doctrine of res judicata bars relitigation of a claim if that claim has been previously litigated before a court of competent jurisdiction. The doctrines of res judicata and collateral estoppel are intended to provide fairness to the litigation process and to stop adjudication of the same matter over and over again. On the other hand, since res judi-

cata is based on a policy of fairness, it should not be applied to prevent a litigant from having his claims heard once. Only those claims which have been previously heard and decided are candidates for res judicata.

The Supreme Court has discussed the policy reasons for the doctrine of res judicata in a number of recent opinions. Federated Dept. Stores v. Moite, 452 U.S. 394; 69 L.Ed.2d 103 (1980); Allen v. McCurry, 449 U.S. 90; 66 L.Ed.2d 268 (1980); Brown v. Felsen 442 U.S 127; 60 L.Ed.2d 769 (1979). In general, the Supreme Court has looked with favor on the doctrine, properly applied. However, in Montana v. United States, 440 U.S. 147; 59 L.Ed. 869 (1979) the court noted the requirement that the application of res judicata necessitates that the party to be bound actually had a "full and fair opportunity to litigate" in the prior proceeding. Montana, supra, at 153.

As a non-participant in the bankruptcy proceedings, the petitioner had no opportunity to protect his rights. Moreover, he had no notice that bankruptcy court approval of the tender offer would affect the judgment creditor rights of the non-tendering bondholders. Now, the opinions below have interpreted the phrase "as provided in the First Mortgage" in the agreement signed by Penn Central, NYCRR and the Trustee as adversely changing the rights of the non-tendering bondholders, and acting as res judicata on the petitioner even though he was not present or aware that his rights were being affected. That is simply too harsh; res judicata is not intended to cut off rights which were not originally fully and finally "litigated" in the first instance.

CONCLUSION

For the foregoing reasons, we respectfully request that the Supreme Court grant this petition for a writ of certiorari to review the

determination that res judicata bars the petitioner's claims.

Dated: March 5, 1987

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

ROBERT W. HUISKAMP,	:	CIVIL ACTION
v.	:	
NEW YORK CONNECTING RAILROAD COMPANY and HORIZON TRUST COMPANY	:	NO. 85-1718

MEMORANDUM AND ORDER

FULLAM, J. MARCH 3, 1986

Pursuant to a First Mortgage Indenture dated October 1, 1940, the New York Connecting Railroad Company issued certain "2-7/8% Series B Bonds". The bonds were backed by the guarantee of a predecessor of Penn Central Transportation Company, to which the New York Connecting Railroad Company had leased its rail lines for a long term, at rentals calculated to enable New York Connecting to amortize the bonds and pay dividends.

Plaintiff Robert Huiskamp is a former holder of a substantial number of these bonds

who contends that he did not receive full payment when he redeemed his bonds. The interest rate specified on the face of the bonds was 2-7/8%, and it is agreed that plaintiff received payment in full of the principal amount of the bonds plus accrued interest (and interest on the interest) at 2-7/8%. It is plaintiff's contention that, under the theories discussed below, he was entitled to a higher rate of interest. It was expressly agreed, when plaintiff redeemed his bonds, that the redemption was without prejudice to plaintiff's right to pursue the claims asserted in this litigation.

The parties' respective contentions are best understood after briefly sketching the legal ramifications of railroad leases in bankruptcy proceedings. At a time in our history when rail systems were being developed -- as distinguished from an aggregation of smaller, separate companies whose operations were somewhat Balkanized -- the long-term railroad lease was frequently utilized as the mechan-

ism for financing the necessary construction and achieving the desired consolidation of operations, while avoiding the legal and practical obstacles to railroad mergers.

The bankruptcy of the lessee railroad can be expected to cause the immediate cessation of rental payments -- except in the rare case in which the lessee's trustee is in a position to, and does, assume the lease obligations. By the time of the lessee's bankruptcy, it is usually the case that the lessor is no longer capable of operating a railroad, having been effectively removed from the railroad business for many years. But it is not permissible to terminate rail operations, for various economic and regulatory reasons. Thus, the usual situation, following the bankruptcy of the lessee railroad, is that the bankrupt lessee continues to conduct rail operations, but is deemed to do so for the account of the lessor. Rejection of the lease gives rise to claims against the estate of the bankrupt lessee. Conversely, if rail opera-

tions over the leased lines result in further losses, the bankrupt lessee has claims against the lessor to that extent. Of course, determining the amount of profit or loss generated by the conduct of rail operations over a particular portion of a rail system is a very difficult, expensive and time-consuming task, capable of spawning protracted litigation.

When the lease covers virtually all of the property of the lessor, the bankruptcy of the lessee may trigger the bankruptcy of the lessor. In the case of Penn Central Transportation Company, some 14 lessors entered bankruptcy, under the aegis of the same court handling the Penn Central bankruptcy. Several other lessors, including New York Connecting, did not need to seek the protection of the bankruptcy court.

With respect to the bankruptcy lessors, it was possible to devise reorganization plans in conjunction with the reorganization of Penn Central itself, given the "cram-down"

provisions of § 77 of the Bankruptcy Act, as it then existed. The reorganization court in each instance undoubtedly had jurisdiction over the property of the bankrupt lessor. With respect to the non-bankrupt lessors such as New York Connecting, however, there was great uncertainty as to the extent of the jurisdiction of the Penn Central bankruptcy court. It was clear that the Penn Central reorganization court had jurisdiction over the leased lines, and could prevent interference with rail operations over these lines, and could suspend enforcement of the lease provisions against Penn Central. But it was at least highly doubtful that the Penn Central Reorganization Plan could achieve a final adjustment of the claims of New York Connecting's bondholders without their consent.

An already complex legal situation was further complicated when, pursuant to the Regional Rail Reorganization Act of 1973, the bankrupt railroads, including Penn Central, were required to convey their rail properties

to ConRail on April 1, 1976. This conveyance included substantially all of the assets covered by the New York Connecting lease. The amount of the consideration to be paid by ConRail to the bankrupt railroads remained to be determined later, through valuation proceedings in the Special Court (the "Valuation Case"). Payment would be in the form of certificates of value ("CV's") which would bear interest at the rate of 8% per annum from and after April 1, 1976.

The 1978 Reorganization Plan for the Penn Central Transportation Company provided a "10 triple 30" form of distribution to bondholders -- 10% cash, 30% in each of three types of securities. The debt securities, if not sooner paid, would eventually be paid from the proceeds of the Valuation Case. The reorganization plans for the bankrupt leased lines included comparable provisions.

In order to achieve an acceptable solution in the case of non-bankrupt lessors such as New York Connecting, there were extensive

discussions and negotiations between Penn Central representatives and the representatives of their bondholders. As of the date of the conveyance of the properties to ConRail, the claims of New York Connecting's bondholders, under the terms of the mortgage, aggregated approximately $21.8 million. The assets of New York Connecting which had been conveyed to ConRail had a book value of about $16.4 million (but had been valued by U.S. Railway Association at only $6.2 million). New York Connecting had about $100,000 in cash and other assets. Penn Central's running account of transactions between New York Connecting and Penn Central showed a balance due New York Connecting of about $3.7 million; an engineering study of rail operations over the New York Connecting lines showed losses at the rate of about $1.5 million per year for each of the two years studied. There were arguable bases for contesting the accuracy of all of these figures.

In June 1979, a settlement agreement was reached between Penn Central, on the one hand,

and New York Connecting and the indenture trustee for its bondholders, on the other. The settlement agreement was submitted to this court for approval. After a duly noticed hearing -- notice was sent to each bondholder -- I approved the compromise settlement on October 1, 1979 (Order No. 4003).

The settlement agreement contemplated that Penn Central would carry out a tender offer for the acquisition of the outstanding bonds of New York Connecting, offering essentially the same "10-triple-30" package which the reorganization plans of Penn Central and the secondary debtors gave to other bondholders. After approval of the settlement agreement, Penn Central carried out the tender offer and acquired most of the outstanding bonds. Plaintiff did not tender his bonds.

Paragraph 8 of the settlement agreement provides as follows:

"8. Treatment of bonds not acquired by Penn Central. In the

> event that Penn Central acquires some but not all of the New York Connecting bonds pursuant to the tender offer, the amounts which may be due holders of New York Connecting bonds that are not so acquired shall be satisfied, as provided in the First Mortgage and subject to the provisions of Paragraph 6 of this agreement, out of the proceeds of the recovery of the New York Connecting in the Valuation Case and any other assets of New York Connecting available for that purpose. To the extent that such amounts are not so satisfied in full, they will be entitled to be satisfied as unsecured claims included within Class M of the Plan (i.e., Penn Central's Reorganization Plan) by means of the issuance of common stock and certificates of beneficial interest."

Paragraph 7 of the same agreement provided for the mutual cancellation and discharge of all claims among New York Connecting, the indenture trustee, and Penn Central, under the guarantee agreement in which Penn Central had guaranteed the payment of the bonds.

In due course, the proceeds from the Valuation Case recovery became available to New York Connecting. Plaintiff was paid the face amount of his bonds, together with accrued interest at the rate of 2-7/8%. The payment included interest at the same rate on the interest accruing after default (i.e., after 1970). As noted above, plaintiff contends that such payment did not full satisfy his claims, and he reserved the right to proceed with this litigation.

Plaintiff's basic contention is relatively straightforward. The interest rate on the face of the bonds is 2-7/8% per annum but the law of New York provides for a much higher rate of interest on judgments. When default in interest payments occurred in 1970, and a fortiori, when there was default in the payment of principal in 1975, the indenture trustee should have obtained a judgment against New York Connecting for the entire amount then due. That judgment would have borne interest at the statutory rate (7-1/2%), in 1970).

Penn Central, as the successor to New York Connecting[1] is liable for the amount of interest remaining unpaid. And the Horizon Trust Company, as successor to the Bank of New York, which was the indenture trustee of the New York Connecting Bond issue, is liable for breach of its fiduciary duties in failing to protect the interests of the bondholders by obtaining that result.

The correctness of plaintiff's legal position is, it is argued, further supported by equitable ocnsideration: the proceeds of the Valudation Case included interest at the rate of 8% from and after April 1, 1976.

The basic difficulty with plaintiff's

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1. Penn Central owned all of the common stock of New York Connecting at all relevant times. After the tender offer for the bonds, New York Connecting was merged into the reorganized Penn Central.

arguments, in my view, is that they come much too late in the day. The indenture trustee did file suit, in a New York court, when the principal default occurred in 1975. The litigants then negotiated a consent decree, under which the entry of judgment for the balance then due on the bonds was conditioned upon the agreement that leave of this court would be required before any attempt was made to enforce the judgment. There can be no contention that it was improper for the indenture trustee to agree to the terms of this consent judgment. Not only were all of the assets which might have been looked to for collection of the judgment within the control of the Penn Central bankruptcy proceeding and about to be conveyed to ConRail under the aegis of the Special Court, but any attempt to enforce the judgment would undoubtedly have precipitated the bankruptcy of New York Connecting (i.e., it would have joined the other secondary debtors). The probable fate of a claim for statutory interest, in that event, would surely

have been problematical at best.

Thus, plaintiff's contention that the indenture trustee could have, and should have, placed the bondholders in a position to assert claims for interest at the statutory rate is quite dubious. More importantly, however, plaintiff's claims in this action are precluded in the res judicata effect of Order No. 4003 in the Penn Central reorganization proceeding, approving the settlement agreement. The settlement agreement approved by this court provided that non-tendered bonds would be satisfied "as provided in the First Mortgage" from proceeds of the Valuation Case. There can be no doubt whatever as to what the First Mortgage provided on that score. In the event of default, the bondholders were entitled to payment of

> ". . . the whole amount then owing or accrued and unpaid upon Bond for principal and interest; with interest on the overdue principal and on the overdue installments of interest at the same rates respectively borne by the bonds. . . ." (§ 13 of Article Seven.)

Similar provisions are scattered throughout the pertinent portions of the indenture; see Article Seven, § 1, § 2, and § 15.

Plaintiff, whose attorney is his brother, was notified of the hearing on the proposed settlement agreement, and should have registered his objections, if any, at the time. Penn Central, in carrying out the tender offer, and the tendering bondholders as well, plainly did, and were entitled to, rely upon the approved settlement agreement in making the relevant decisions.

The record makes clear that plaintiff was in fairly frequent contact with the indenture trustee and its counsel, and was kept fully informed of developments. He was invited to, but did not, attend a 1977 meeting of bondholders to discuss possible need for "concerted action". At no time until after approval of the settlement agreement and the implementation of the tender offer, did plaintiff ever complain of the conduct of the indenture trustee or lodge any objection with

this court.

It is true that some of the delay experienced by plaintiff in obtaining payment for his bonds was occasioned by the Regional Rail Reorganization Act of 1973 and the ensuing Valuation Case; and that Congress sought to compensate for that delay by providing for interest on the April 1976 valuations, at the rate of 8%, from and after the date of conveyance. By that device, New York Connecting was assured that the assets available as of April 1, 1976 to pay off its bonds would remain available, without further erosion. But that, of course, has no legal effect on the amounts due the bondholders -- a matter governed by the terms of the First Mortgage.

While it might be possible to fashion an equitable argument to the effect that the claims of the bondholders should likewise be insulated from further erosion caused by the passage of time after April 1, 1976, I am not free to do so in the present case. When the 1979 settlement agreement was negotiated, and

when it was presented and approved by this court, all concerned were fully aware of the 8% interest rate on the Valuation Case proceeds. Under the terms of the settlement agreement, each bondholder was given the option of accepting Penn Central's tender offer -- in which case the cash and securities tendered in payment included some additional interest (after the consummation date of the Penn Central Reorganization Plan) -- or of rejecting the tender offer and receiving the payment of principal and interest called for in the First Mortgage. If some other alternative were deemed more equitable, that objection should have been raised at the time. After approval of the settlement agreement, and reliance thereon by so many parties, it would plainly be inappropriate to attempt to restructure the transaction.

Plaintiff has received all that is due him under the clear terms of the First Mortgage. His theory that the New York judgment should have enhanced his prospects, and that a claim for additional interest would have been

recognized in the pertinent bankruptcy proceedings, is not very persuasive, and, in any event, is no longer cognizable. The defendants' motion for summary judgment will therefore be granted.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT W. HUISKAMP,	:	CIVIL ACTION
v.	:	
NEW YORK CONNECTING RAILROAD COMPANY and HORIZON TRUST COMPANY	:	NO. 85-1718

ORDER

AND NOW, this 3rd day of March, 1986, it is ORDERED:

1. Deendants' (sic) Motion for Summary Judgment is GRANTED.

2. This action is DISMISSED.

/s/ John T. Fullam

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1176

ROBERT W. HUISKAMP

v.

NEW YORK CONNECTING RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 85-1718)
District Judge: Hon. John P. Fullam

Argued
October 14, 1986
Before: GIBBONS and BECKER, Circuit Judges
and BROWN, District Judge*

(Opinion Filed: November 10, 1986)

MEMORANDUM OPINION OF THE COURT

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*Hon. Garrett E. Brown, Jr., United States District Judge for the District of New Jersey, sittin- 'y designation.

GIBBONS, Circuit Judge:

Robert W. Huiskamp, a holder of bonds issued by New York Connecting Railroad Company, of which Horizon Trust Company is the indenture trustee, appeals from a summary judgment in favor of New York Connecting Railroad Company and the indenture trustee, in his suit for additional interest. Huiskamp has been paid the principal and interest to the date of default in full, and interest on the amount due as of the date of default at 2-7/8%, which is the rate specified in the indenture. He contends that because the indenture trustee reduced the bondholders' claims to a judgment on June 29, 1976, he is entitled to interest at the New York legal rate from that date forward.

Huiskamp also contends that if the judgment does not entitle him to the higher rate of default interest, the trustee is liable to him for breach of fiduciary duty in not obtaining the higher rate or for settling the bond holder's claim for the lower rate. We

affirm the district court's rejection of Huiskamp's claims. We endorse the reasoning set forth in Judge Fullam's opinion. We write because there were certain points not addressed in terms therein, and because appellant has argued somewhat differently on appeal than he did in the district court. It is undisputed that because of the pendency of the Penn Central reorganization proceedings, the Trustee and NYCRR agreed that the 1976 judgment would not be enforced by an execution. On June 19, 1979, the trustees in reorganization and the indenture trustee entered into a settlement agreement with respect to claims of New York Connecting Railroad bondholders. That agreement provided that Penn Central would make a tender offer for those bonds. It provided further:

> 8. Treatment of Bonds Not Acquired by Penn Central. In the event that Penn Central acquires some but not all of the New York Connecting bonds pursuant to the tender offer, the amounts which may be due holders of New York Connecting bonds that are not so

> acquired shall be satisfied, as provided in the First Mortgage and subject to the provisions of this Agreement, out of the proceeds of the recovery of New York Connecting in the valuation case and any other assets of New York Connecting available for that purpose.

The settlement agreement was submitted to and approved by the reorganization court in Order No. 4008. No appeal was taken from that order. It is clear that Huiskamp has been paid "as provided in the First Mortgage" out of the recovery of New York Connecting in the valuation case. Although Huiskamp contends that he is entitled to 8% because the higher rate attached immediately upon entry of judgment and replaced the contract rate, the fact is that Huiskamp is bound by the bond trustees' contemporaneous agreement that the higher rate did not apply.

The district court held that Order No. 4008 is a final judgment binding on Huiskamp, and that his claim is barred by res judicata. We agree that there was identity of claims,

identity of parties, an opportunity to be heard, and a final judgment. Thus we agree that Order No. 4008 binds Huiskamp.

Huiskamp contends that even if Order No. 4008 adjudicated his claim against New York Connecting Railroad Company it did not dispose of his separate claims against the indenture trustee for breach of his separate claims against the indenture trustee for breach of its fiduciary duty in failing to press the claim for interest at the legal rate. We hold that the indenture trustee was entitled to summary judgment on that claim because the undisputed facts shown that no such breach occurred. It is clear that in agreeing to payment of interest at the contract rate in accordance with the terms of the indenture, the trustee acted reasonably; although the bond trustee originally claimed the legal rate, the claim was resisted and the compromise was appropriate -- not only because it was doubtful whether he could have prevailed given the terms of the indenture, but also because the

reorganization had potentially threatened the ability of New York Connecting to pay the bond holders. Huiskamp had ample opportunity to raise his point with the bond trustee and with the court but, despite his counsel's inquiries, to all of which the trustee responded, he took no action and it is now too late in the date for him to object.[1] The compromise reflected in order No. 4008 was a reasonable exercise of the indenture trustee's judgment. We find no merit in Huiskamp's argument that the indenture trustee acted in violation of Article 7, Section 15. The bondholders were paid in accordance with the terms of the indenture.

The judgment appealed from will therefore be affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum

Opinion.

/s/
Circuit Judge

---

1. At oral argument Huiskamp raised a rather interesting claim that, after judgment, the bond trustee became a mere collection agent who had no fiduciary duty. We decline to address any possible merit to this contention since it was not raised in the district court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1176

ROBERT W. HUISKAMP

v.

NEW YORK CONNECTING RAILROAD COMPANY

(D.C. Civil No. 85-1718)

Before: GIBBONS and BECKER, Circuit Judges, and BROWN, District Judge*

Upon the consideration of the petition for rehearing by appellant before the original panel,

It is O R D E R E D that the petition for rehearing before the original panel is denied.

By the Court,

Dated: December 9, 1986

/s/_____
Circuit Judge

---

*Hon. Garrett E. Brown Jr., United States District Judge for the District of New Jersey, sitting by designation.

PROOF OF SERVICE

I am a resident of the County of San Diego, over the age of eighteen years, and not a party to the within action or proceeding. My business address is 101 West Broadway, Suite 400, San Diego, California 92101. I deposited in the United States Mail, postage prepaid, Express Mail, the Petitioner's Petition for Writ of Certiorari on the 10 day of April, 1987:

The Supreme Court of the
United States — Original plus
Office of the Clerk — 40 Copies
Washington, D.C. 20543

Matthew J. Siembieda, Esquire — 3 copies
1200 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103

Robert J. Siverd — 3 Copies
2920 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed on April 10, 1987.

Elaine Bailey

No. 86-1677

Supreme Court, U.S.
FILED
MAY 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT W. HUISKAMP,

Petitioner,

—vs.—

NEW YORK CONNECTING RAILROAD COMPANY,

—and—

HORIZON TRUST COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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30 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the District Court and Court of Appeals err in holding, under state law, that the doctrine of res judicata barred relitigation of a bondholder's claims for interest over and above the specified bond rate, which were previously asserted by an indenture trustee on behalf of bondholders in litigation that raised the same issues, involved the same parties, and resulted in a final judgment after notice and an opportunity to be heard?

THE PARTIES

This statement is made pursuant to Rule 28.1 of this Court. The Penn Central Corporation ("Penn Central") is the successor by merger to the named Respondent, New York Connecting Railroad Company ("New York Connecting"). Respondent, Horizon Trust Company ("Horizon" or the "Trustee"), has no parent company. Neither Penn Central, New York Connecting, nor Horizon has any subsidiaries or affiliates which have any publicly held securities.

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COUNTER-STATEMENT OF THE CASE

This petition arises out of the affirmance by the Court of Appeals of the dismissal of diversity claims by Robert W. Huiskamp ("Huiskamp" or "Petitioner"), a former New York Connecting bondholder. It involves the application of established common law doctrine of res judicata to Huiskamp's claims concerning his former ownership of forty-three New York Connecting $1000 face amount, 2 7/8% Series B bonds. These bonds were originally issued to finance railroad construction under a First Mortgage dated October 1, 1940 (the "Trust Indenture" or "First Mortgage"). A lawsuit in 1976 by the Indenture Trustee on behalf of all the bondholders resulted in a consent judgment liquidating the amounts owed to the bondholders under the Trust Indenture. The obligation to the bondholders was later satisfied by means of a tender offer for the bonds which implemented a 1979 court approved settlement, after notice and a hearing in the Penn Central Reorganization Proceedings, No. 70-347 (E.D. Pa.).

Huiskamp claimed in the district court that New York Connecting defaulted on the bonds' principal payments due on October 1, 1975, and interest payments due after June, 1970.[1]

He redeemed all of his bonds after filing suit on March 20, 1985. He was paid the full principal amount plus accrued interest and interest on interest at 2 7/8%. Thus, Huiskamp was paid all that was due him under the terms of the First Mortgage, but he still continued this case in the hope of obtaining a recovery involving a higher rate of interest than the Trust Indenture provided. The district court granted respondents' motion for summary judgment, and the Court of Appeals affirmed.

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1 The complaint also charged that Horizon breached a fiduciary duty to bondholders by, among other things, failing to keep bondholders apprised of their rights and to protect bondholder rights.

Petitioner's statement of facts makes almost no reference to the opinions of the courts below, and in numerous instances omits material facts of record. The facts as found and recited in the lower court opinions are virtually undisputed.[2] Moreover, the lower courts had before them all of the facts obtained in discovery that bore on Huiskamp's claims.

1. Penn Central's Reorganization and the Default By New York Connecting On The 2 7/8% Series B Bonds.

Huiskamp formerly owned forty-three New York Connecting 2 7/8% Series B Bonds. The rate of interest borne by these bonds was 2 7/8%. (A-1 and 2; 260a).[3] The Trust Indenture specified in Article Seven that the amount of interest to be paid in the event of default is fixed at the same rates of interest borne by the bonds. (A-13 and 14; 132a-35a; 135a-36a; 140a-41a; 142a).

The bonds were guaranteed by a Penn Central predecessor, to which New York Connecting had leased its rail lines for a long term, at rentals calculated to enable the amortization of bonds and payment of dividends. Such long-term railroad leases were frequently used to finance the necessary construction and to consolidate operations, while avoiding the legal and practical obstacles to railroad mergers. (A-2 and 3).

On June 21, 1970, Penn Central filed for reorganization. The Honorable John P. Fullam, Chief Judge of the United States District Court of the Eastern District of Pennsylvania (and the district court below in this case) presided over the reorganization.[4]

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2 Where disputed, the lower courts viewed the facts, on this motion for summary judgment, in a light most favorable to Huiskamp.

3 Citations designated as "A-" refer to the Appendix attached to Huiskamp's Petition for Writ of Certiorari. Citations designated with an "a" refer to the Appendix in the Court of Appeals.

4 Huiskamp inaccurately refers to actions of a "bankruptcy court" throughout his petition. Penn Central's reorganization was before a United States District Court, sitting as a Reorganization Court under Section 77, *Reorganization of Railroads Engaged in Interstate Commerce*, of the Bankruptcy Act. 11 U.S.C. § 205. *See*, 5 *Collier on Bankruptcy*, ¶ 77.11 (1978 and 1986 Supp.).

As a result of Penn Central's bankruptcy, fourteen railroad lessors similar to New York Connecting also entered reorganization. (A-4 and 5). Although New York Connecting did not reorganize, it was clear that the only assets available to satisfy its obligations were from the Penn Central estate. (*Id.*; 289a-92a; 308a; 293a, 301a; 365a-79a). This was so because the Reorganization Court in Order No. 1 enjoined all parties from enforcing liens on property owned or in the possession of Penn Central. Accordingly, no action could be taken by the Trustee to enforce the bonds or the mortgage under the Trust Indenture. (185a-89a). If such action were taken, it would have precipitated New York Connecting's bankruptcy and forced it to join other secondary debtors. (A-12 and 13). Furthermore, Penn Central had claims against New York Connecting for operating the leased property at a deficit. Given the reorganization proceedings, neither Penn Central nor New York Connecting paid the principal when the 2 7/8% Series B Bonds matured on October 1, 1974, or the coupon interest payments that became due after June, 1970 (210a).

2. The 1976 Lawsuit and Consent Judgment For $21,247,989.00 On Behalf of Bondholders Like Huiskamp.

On June 25, 1976, while the Penn Central reorganization was still pending, Horizon (as the Bank of New Jersey) sued New York Connecting on behalf of bondholders, including Huiskamp, in the United States District Court for Southern District of New York, 76 Civ. 2804. (The "Trustee's Suit"). That case raised the same basic claim presented by Huiskamp in this case: liability on the bonds arising from the default on payments of principal and interest due on the 2 7/8% Series B bonds. The complaint sought judgment of $20,808,737 and interest thereon at 2 7/8% from October 1, 1975, the date of the default on principal payments. (256a-58a). The action was brought as a protective measure to preserve bondholders' rights against a claim that the statute of limitations against bondholders had or would run out. (271a-72a; 274a-75).

The Trustee and New York Connecting resolved the litigation via a consent judgment subject to a stipulation consenting to the entry of a judgment in the Trustee's Suit, on June 25, 1976. The stipulation was based on two conditions: (1) the judgment would not be enforced against New York Connecting without approval of Judge Fullam, as the Penn Central Reorganization Court, or a decree from the Reorganization Court that approval was not required; and (2) the consent judgment was not a waiver of the right of Penn Central to contend that neither the interest in default nor the interest on interest should be paid by New York Connecting or Penn Central. (A-7; 181a-82a; 286a).

A consent judgment in the amount of $21,247,989 was entered on June 29, 1976, in the Trustee's Suit. The interest rate on the overdue amounts under this judgment was 2 7/8%. The consent judgment specifically incorporated the June 25, 1976 stipulation. (215a-18a; 195a-98; 204a-05a; 289a). Huiskamp's petition does not anywhere refer to the stipulation in the Trustee's Suit and only makes passing reference to the consent judgment. (Petition at 3 and 4). Yet these two uncontroverted facts—particularly the condition that the consent judgment would not be enforced against New York Connecting without approval of Judge Fullam as the Penn Central Reorganization Court—are central to the holdings of the courts below. (A-12 to A-14).

The Trustee sent notice of the Trustee's Suit and the judgment for $21,247,989 to the bondholders on August 27, 1976. (289a-92a).

The district court found that "[t]here can be no contention that it was improper for the indenture trustee to agree to the terms of this consent judgment". (A-12).[5] The court concluded further that all of the assets which would have been used to collect the judgment were "within the control of the Penn Central bankruptcy proceeding and about to be conveyed to ConRail under the aegis of the Special Court"; and, moreover,

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5 This is supported by the uncontroverted record. Article Seven, Section 3 of the Trust Indenture authorized the Trustee to act on behalf of bondholders in the event of default. (137a).

"any attempt to enforce the judgment would undoubtedly have precipitated the bankruptcy of New York Connecting". (A-12).

3. Summary Judgment Was Granted In Favor of New York Connecting In A Class Action By Bondholders.

Similar issues to those raised in this case were also presented in a class action in 1976 by bondholders in *Sylvia Friedman, on behalf of all holders of New York Connecting Company, First Mortgage, series B 2&7/8% Bonds due October 1, 1975* v. *New York Connecting R.R. Co.*, Index No. 1230/76 (Supreme Court of New York). There, the court granted summary judgment for New York Connecting and against the bondholders on the grounds that the Trustee had already obtained the consent judgment in the Trustee's Suit. (624a-26a).

4. Conveyance of Rail Properties to ConRail and Consummation of the Penn Central Reorganization.

During the Penn Central Reorganization, effective April 1, 1976, New York Connecting along with Penn Central and other transferors conveyed substantially all of their rail properties to Consolidated Rail Corporation ("ConRail"), pursuant to the Regional Rail Reorganization Act of 1973 ("The Rail Act"), 45 U.S.C. §§ 701-797. (190a-91a).[6] The Rail Act mandated that payment for the conveyed rail property was to be in the form of certificates of value bearing interest at 8% per year from and after April 1, 1976. (A-6; 45 U.S.C. §§ 743, 746). After this transfer, New York Connecting had no real property or rail lines. Its principal asset was a claim in the Valuation Case, a proceeding before a Special Court established under the Rail Act for compensation for the properties conveyed to ConRail pursuant to the Rail Act. 45 U.S.C. § 743(c); *In the Matter of*

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6 The purpose of the Rail Act was to effect a restructuring of Northeastern U.S. railroads. The Rail Act amended Section 77 of the Bankruptcy Act (formerly 11 U.S.C. § 205) particularly with respect to the role of the Interstate Commerce Commission, and left to the Reorganization Court the task of reorganizing Penn Central's retained non-railroad assets.

the Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act, No. 76-1 (Special Court). Bondholders were notified of these developments in a letter to bondholders dated, August 27, 1976, and in tender offer documents dated December 10, 1979. (289a-92a; 365a-79a).

On March 17, 1978, the Reorganization Court approved the Amended Plan of Reorganization for Penn Central Transportation Company (A-6).[7] During the same time, Penn Central had extensive discussions and negotiations with representatives of non-bankrupt lessors, such as New York Connecting, to achieve acceptable resolutions of outstanding claims. (A-6 and 7). And of course, by this time a consent judgment had been entered in the Trustee's Suit under which New York Connecting and the Trustee, on behalf of the bondholders, agreed to seek enforcement of the consent judgment in the Reorganization Court.

5. The 1979 Court Approved Settlement Provided For Satisfaction of Bondholder Claims Through A Tender Offer, Or That Those Electing Not To Tender Would Be Satisfied Under The Terms Of The Trust Indenture.

Shortly after the consummation of the Penn Central Reorganization Plan, Penn Central, New York Connecting and the Trustee on June 19, 1979, petitioned the Reorganization Court for approval of an independently negotiated settlement agreement governing bondholders' claims. This provided for Penn Central to make a tender offer to acquire the 2 7/8% Series B bonds, and that those failing to tender would have their claims satisfied, as provided by the Trust Indenture, from proceeds

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7 The terms of the Plan, among other things, provided for the satisfaction of claims of Penn Central's secured creditors, such as bondholders. Such creditors, including bondholders, received a "10-triple-30" form of distribution: 10% cash and 30% in each of three types of securities—mortgage bonds, preferred stock and common stock. (A-6).

obtained in the Valuation Case. (A-8 to A-10; 308a; 293a-327a).[8]

The Reorganization Court ordered a hearing date of July 17, 1979, and required that each bondholder be mailed written notice of the Petition for Approval of the Settlement Agreement, the terms of the settlement agreement and the court's Order. (308a). This was done on June 20, 1979 when copies were mailed to the bondholders—including Huiskamp, Huiskamp's father and Huiskamp's brother/lawyer of record in this case, John S. Huiskamp, Esquire. (A-14; unnumbered page between 327a and 328a; 336a-37a; 261a-62a).

On June 26, 1979, John S. Huiskamp, Esquire, acknowledged receipt of the proposed settlement. (356a).

A hearing on the Petition for Approval of the Settlement Agreement was held on July 17, 1979. Bondholders had the opportunity to present any objections to the Petition and, in fact, some appeared and were heard. But, Huiskamp (and the other members of his family including his lawyer) failed to assert any objections. (A-14 to A-17; 263a-64).

By letter dated September 21, 1979, Huiskamp through his lawyer inquired about the court's disposition of the Petition for a Settlement Agreement. (362a). He was notified that no action had been taken. (363a).

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8 Section 8 of the settlement agreement governs non-tendering bondholders and provides in pertinent part (301a):

> 8. *Treatment of Bonds Not Acquired by Penn Central.* In the event that Penn Central acquires some but not all of the New York Connecting Bonds pursuant to the tender offer, the amounts which may be due holders of New York Connecting Bonds that are not so acquired *shall be satisfied, as provided in the First Mortgage* and subject to the provisions of paragraph 6 of this Agreement, out of the proceeds of the the recovery of New York Connecting and the Valuation Case and any other assets of New York Connecting available for that purpose.

(Emphasis added throughout unless indicated to the contrary).

On October 1, 1979, in Order No. 4003 of the Penn Central Reorganization, the court approved the Petition and the Settlement Agreement after notice to the bondholders and other interested parties and the hearing. (A-8; 364a).

Pursuant to the October 1, 1979 Order, Penn Central implemented a tender offer dated December 10, 1979. (365a-79a; 223a; 199a-200a; 206a). Under the court approved tender offer, holders of New York Connecting 2 7/8% Series B bonds, such as Huiskamp, were given the opportunity to have their claims satisfied under essentially the same "10-triple-30" package which the reorganization plans of Penn Central and the secondary debtors gave to other secured creditors. (365a-79a, A-8). Every other member of Huiskamp's family that held bonds tendered them and accepted this "10-triple-30" package which, with the passage of time, became more valuable. The settlement agreement and tender offer specified, however, that those choosing not to tender their bonds would be entitled to have their claims satisfied "as provided in the First Mortgage [the Trust Indenture]" from a *pro rata* share of any assets of New York Connecting available for that purpose, including any recovery of New York Connecting in the Valuation Case (A-8 and 9; 295a-307a; 365a-79a), which at that time was New York Connecting's only asset.

Huiskamp admits that, between 1972 and the time of the tender offer in 1979, he actively read everything that was sent to him regarding the New York Connecting 2 7/8% Series B bonds, but that he did "nothing". He neither made any demands nor asked the Trustee to act on his behalf. (263a-64a). He chose not to tender his bonds even though his father and his lawyer tendered their bonds. (A-8; 631a; 261-62a).

On November 16, 1980, the Valuation Case settled. On December 4, 1980, the Special Valuation Court approved a settlement agreement among Penn Central and its subsidiaries, the United States Railway Association and the United States of America concerning the amount to be paid under the April 1, 1976 conveyance to ConRail. Thus, a fund was created from which claims of bondholders who failed to tender could be

satisfied. On January 28, 1981, New York Connecting notified remaining shareholders of the 2 7/8% Series B bonds of the availability of funds to pay obligations to them. (380a-83a; 225a-28a).

6. Huiskamp "Was Kept Fully Informed Of Developments" Concerning His Rights As A Bondholder From April 1975 Onward.

Huiskamp and his brother/counsel were continuously advised and assisted by the Trustee and Penn Central regarding their rights as bondholders. As the district court found: "The record makes clear that [Huiskamp] was in fairly frequent contact with the indenture trustee and its counsel, and was kept fully informed of developments." (A-14). This finding is amply supported by the undisputed record:

(a) As early as March and April of 1975, Huiskamp's lawyer advised counsel for New York Connecting and the Bank that he and other members of his family held a substantial amount of New York Connecting bonds. On behalf of his family members, he requested information about action taken to protect their interest as bondholders. (384a-86a).

(b) By letter dated April 9, 1975, the Trustee's counsel notified Huiskamp's lawyer that the Reorganization Court had enjoined the Trustee from instituting foreclosure proceedings authorized by virtue of the default on the mortgage. (387a).

(c) By letter dated August 27, 1976, the Trustee notified bondholders like Huiskamp of the Trustee's Suit and judgment of $21,247,989. It also invited bondholders to provide notice of whether they desired a meeting to "discuss the issues and determine if concerted action on their behalf is appropriate and the means of pursuing such action". (289a-92a). Notice of the meeting was sent on February 9, 1977. (388a). The Huiskamps were aware of this meeting which was held in New York on February 23, 1977, but were unrepresented because their "attorney in New York was unable to attend the meeting at Morgan Guaranty Trust due to a conflict in his schedule". (389a-90a; A-14).

(d) The Trustee's counsel responded to a request from Huiskamp's lawyer for a status report on the bonds (389a-90a), and explained in part that (404a):

> No foreclosure action against the property of New York Connecting was possible, inasmuch as such action was specifically enjoined by the Reorganization Court. By virtue of the compelled conveyance under the Rail Act, substantially all of the property of New York Connecting was transferred to ConRail free and clear of all liens. We have filed and been granted leave to intervene in the proceedings before the Special Court which is required under the provisions of the Rail Act to determine whether the designated value of the property conveyed to ConRail is adequate.

It was further explained that:

> No action was taken for use and occupancy of the property of New York Connecting for multiple reasons, among which is the fact that the line was operated by Penn Central at a loss and that operational losses are to be paid prior to payment of the mortgage obligation.

(e) Huiskamp's lawyer thereafter requested additional information regarding the bonds and the Penn Central reorganization. (389a-90a). Counsel for the Trustee responded by letter dated March 2, 1977. (417a).

(f) Penn Central's Plan of Reorganization was sent to bondholders by the Trustee on March 7, 1977. (391a).

(g) By letter dated March 16, 1977, Huiskamp's counsel in this case notified the Trustee's lawyers that (392a-93a):

> We are currently in the process of identifying the bonds which are held by our family for the court so that we may be in a position to vote on the New York Plan of Reorganization—we hold a block of $359,000 par value bonds. We contemplate filing a statement of position in addition to voting. We understand that these statements of positions must be filed by March 31, 1977. With this in

> mind, we would appreciate knowing what position you intend to take on behalf of New York Connecting Railroad Company, and the form in which you intend to assert the position of the company. We do not wish to take any position which would be contrary to those taken by you, to the extent we believe your position to be correct.

Moreover, he specifically inquired about the precise issues raised in this case (393a):

> The claim for interest due resulting from nonpayment of the New York Connecting Railroad bonds when due (prior to October 1975 the rate of interest was 2 7/8%; on default, however, the bonds are payable at a higher rate; *at what rate are you claiming interest due after default*).

(h) Counsel for the Trustee responded on March 22, 1977, by explaining the Trustee's Suit and its judgment, and that under the Trust Indenture the unpaid amounts were subject to the same rate as that borne by the bonds. (395a-96a):

> The Bank of New Jersey, as Indenture Trustee, on behalf of all bondholders brought a proceeding in the United States District Court, Southern District of New York, against New York Connecting for a judgment on the bonds and mortgage. A judgment in the sum of $21,247,989.00 with interest was obtained representing unpaid interest to June 25, 1976 and matured principal. The Trustees of Penn Central agreed to a consent judgment so that we would preserve our lien. *The indenture provides, however, that interest on overdue payments shall be at the same rate borne by the bonds which are overdue.*

Huiskamp and his lawyer neither objected to this, disputed it, nor claimed that this constituted a breach of any duty by the Trustee.

(i) By letter dated April 11, 1978, the Trustee notified holders of 2 7/8% Series B bonds about the approval of the Penn Central Plan of Reorganization, and that provision for

their claims was not included in the Plan but that notice and the opportunity to accept any settlement proposal would be sent. (397a-99a).

(j) By letter dated February 6, 1979, Huiskamp's lawyer made further inquiry regarding the status of the New York Connecting Bonds. (400a). He was advised by letter dated February 13, 1979 that treatment of the claims of the bondholders was still under discussion and that all bondholders would be advised of developments affecting the status of the bonds. (401a).

(k) In June 1979, the Trustee sent Huiskamp and his lawyer notice of the petition for approval of the settlement agreement, the July 17 hearing on that petition and the tender offer. (unnumbered page between 327a and 328a; 336a-37a). [9]Huiskamp failed to present any objections at the hearing. But, before the hearing Huiskamp's lawyer acknowledged receipt and inquired about the Trustee's position on the value of the assets in the Valuation Case "[i]n order to evaluate the proposal". (356a). This and other inquiries were answered by letter dated July 3, 1979. (359a-60a).

(l) After declining to accept the tender offer, from 1981 through 1984, Huiskamp continued to request and to receive advise from the Trustee and Penn Central regarding his rights. (406a-16a).

7. Huiskamp Redeemed His Bonds For The Full Principal Amount Plus Accrued And Past Due Interest At 2 7/8%.

After filing this suit, Huiskamp redeemed his New York Connecting 2 7/8% Series B bonds. On July 25, 1985, he was paid $58,704.46. This sum represents the amount of unpaid

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9 Notice was not only mailed to each bondholder, pursuant to court order it was also published in The Wall Street Journal, New York Times, Washington Post and newspapers of general circulation in each state in which bondholders were known to reside. (308a).

principal and coupon interest, as well as interest at 2 7/8% on those amounts. (632a; 440a, 241a-42a, 249a-55a).

Based on the foregoing, the district court found that there was an absence of any genuine issue of material fact and that Penn Central and Horizon were entitled to judgment as a matter of law pursuant to Rule 56. More specifically, the district court held that Huiskamp's claims were barred by res judicata and alternatively, undue delay in asserting his claim.[10] The Third Circuit agreed and affirmed.

REASONS FOR DENYING THE PETITION

I. THE PETITION FAILS TO SATISFY RULE 17.1(a) - (c) OF THIS COURT BECAUSE IT PRESENTS NO SPECIAL OR IMPORTANT REASONS FOR GRANTING REVIEW ON A WRIT OF CERTIORARI.

Rule 17.1 of this Court provides that review on writ of certiorari is a matter of discretion that "will be granted only when there are special and important reasons therefor". It lists three categories of reasons, including (a) conflict between federal circuit courts of appeals; (b) conflict between the decision of a state court of last resort on a federal question and that of another state court of last resort or a federal court of appeals; and (c) when a state court or federal court of appeals has "decided a federal question in a way in conflict with applicable decisions of this Court".

None of the foregoing reasons are present here. Instead, Petitioner urges that the collective decision of the lower courts "transports the doctrine of *res judicata* far beyond the limits which the Supreme Court has imposed". (Petition at 7-8). He then explains further that "[i]n applying the doctrine of *res judicata* to the present facts, the opinions below have come

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10 Summary judgment was also granted for the Trustee against Huiskamp's claims for breach of fiduciary duty in the district court, and this too was affirmed by the Third Circuit.

into conflict with well-established Supreme Court rules and decisions". (*Id.* at 10).

Thus, Huiskamp does not contend that there has been a decision or ruling involving a "federal question" applied in a way that conflicts with Supreme Court decisions as required by Rule 17.1(c). This case, which has its federal jurisdiction based on diversity, only involves an analysis of the uncontroverted facts under the applicable state common law doctrine of res judicata.[11] The petition thus presents no special or important reasons for granting review—indeed it raises no federal question at all—and it should be denied. *See, e.g., United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226-27 n.2, 95 S. Ct. 926, 929 n.2 (1975); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614 (1955).

II. THE COURTS BELOW PROPERLY STATED AND APPLIED THE DOCTRINE OF RES JUDICATA IN THE CONTEXT OF UNDISPUTED RECORD FACTS.

The courts below fully considered Huiskamp's contention that res judicata is not a bar to his claims. The district court rejected that contention and properly held that "plaintiff's claims in this action are precluded by the *res judicata* effect of Order No. 4003 in the Penn Central reorganization proceeding, approving the settlement agreement". (A-13).

The Third Circuit affirmed, holding that (A-22-23):

> The district court held that Order No. 400[3] is a final judgment binding on Huiskamp, and that his claim is barred by res judicata. We agree that there was identity of claims, identity of parties, and opportunity to be heard, and a final judgment. Thus we agree that Order No. 400[3] binds Huiskamp.

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11 The choice of law in this diversity action is between the common law of Pennsylvania, which is the forum state, and New York, which under the Trust Indenture governs disputes concerning the New York Connecting 2 7/8% Series B bonds. (Article 11 § 1(o), .161a). No real conflict exists, however, because the common law of res judicata is the same in each jurisdiction.

Res judicata bars relitigation. *See, e.g., Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1933); *Mother's Restaurant, Inc.* v. *Mamma's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983); *Alexander & Alexander, Inc.* v. *Van Impe*, 787 F.2d 163, 165-66 (3d Cir. 1986); *Expert Electric, Inc.* v. *Levin*, 554 F.2d 1227, 1232 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977).

This doctrine embodies the fundamental common law precept that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in subsequent suit between the same parties or their privies". *Montana* v. *United States*, 440 U.S. 147, 153 (1979), *quoting*, *Southern Pacific R.R. Co.* v. *U.S.*, 168 U.S. 1, 48-49 (1897). *Accord*, *United States* v. *Mendoza*, 664 U.S. 154, 158n.3, 104 S. Ct. 568, 571n.3 (1984).

As this Court explained in *Commissioner* v. *Sunnen*, *supra*, 333 U.S. at 597:

> The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereby bound "not only to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac*, 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

Accord, *In re: Teltronics Services, Inc.*, 762 F.2d 185, 190 (2d Cir. 1985) (claims barred by settlement between trustee in bankruptcy and principal creditor, which was approved by the court); *Harris* v. *Pernsley*, 755 F.2d 338, 342 (3d Cir. 1985), *cert. denied*, ____ U.S. ____, 106 S. Ct. 331 (1986).

Huiskamp does not take issue with the foregoing standards. Instead, Petitioner argues that the application of the doctrine of res judicata to the facts of this case did not warrant

dismissal. Such a determination, however, is best left for the lower courts. Also, all of the points raised in Huiskamp's Petition were fully and correctly resolved under the foregoing standards.

A. Identity of Claims Existed.

All of the claims in this case were raised or could have been raised in the Trustee's Suit (for defaulting on payments of principal and interest under the Trust Indenture), or at the 1979 hearing on the court approved settlement agreement which resulted in a tender offer that satisfied all bondholder claims.

Huiskamp makes two arguments: (1) that there was no identity of issues because the "purpose of the bankruptcy petition was to authorize Penn Central's tender offer"; and (2) that "[t]here was no reason for the bankruptcy court to determine or change the judgment creditors status of the [New York Connecting] bondholders" and the "issue in the second suit (whether the bondholders are judgment creditors) was never discussed in the bankruptcy order". (Petition at 13). Thus, Huiskamp does not claim that an improper legal standard for res judicata was applied. Rather, he disagrees with the factual determinations made by the district court, and affirmed by the third circuit, when applying the law to the unique facts of this case.

Huiskamp's first argument, however, amounts to revisionist history. The purpose of the July 17, 1979 hearing was to approve the settlement agreement among New York Connecting, Penn Central and the Trustee (on behalf of the bondholders) resolving bondholder claims on the default. This settlement was to be implemented by a tender offer, or by payment from the Valuation Case for those electing not to tender their bonds. But, contrary to Huiskamp's argument, there is no evidence that the 1979 proceeding was narrowly confined to the tender offer. All of Huiskamp's issues could have been addressed had he chosen to raise them.

Furthermore, Huiskamp's inaccurate presentation of the undisputed facts ignores the entry of the June 29, 1976 consent judgment and the fact that Huiskamp received notice of the settlement agreement, its purpose and the hearing scheduled on it. If he disputed what he now claims was a change in status, his remedy was to object at the hearing.

Based on the uncontroverted record, the district court found that there was an identity of claims because "[t]he indenture trustee did file suit, in a New York court, when the principal default occurred in 1975" (A-12) and that "[t]he litigants then negotiated a consent decree, under which the entry of judgment for the balance then due on the bonds was conditioned upon the agreement that leave of this court would be required before any attempt was made to enforce the judgment." (A-12; see also, 286a-87a; 215a, 218a; 195a-98a; 203a-05a). The district court then concluded that (A-12):

> There can be no contention that it was improper for the indenture trustee to agree to the terms of this consent judgment. Not only were *all of the assets* which might have been looked to for collection of the judgment within the control of the Penn Central bankruptcy proceedings and about to be conveyed to ConRail under the aegis of the Special Court, but any attempt to enforce the judgment would undoubtedly have precipitated the bankruptcy of New York Connecting (*i.e.*, it would have joined the other secondary debtors).[12]

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12 Huiskamp erroneously challenges the Reorganization Court's jurisdiction over the parties and subject matter. (Petition at 11). The record, however, conclusively establishes that jurisdiction existed. First, New York Connecting and the Trustee agreed to have bondholder claims approved before the Reorganization Court by the June 29, 1976 consent judgment. (202a-03a). Such bondholder claims were in fact approved by court order, after notice and a hearing, in a representative proceeding before the Reorganization Court, which served as a forum for hearing and approving the voluntary proposals to satisfy bondholder claims. (A-6 to 9). Second, all of the assets of New York Connecting, as well as Penn Central's claims against New York Connecting for operating the leased property at a deficit, were

As to Huiskamp's second argument, there was no modification of the rights of the non-tendering bondholders. They continued to be entitled to precisely the rights under Section 13 of the Trust Indenture, no more, no less: accrued and past due interest at 2 7/8%.[13] In fact, the consent judgment fixed interest from the time of default until the date of the judgment at a rate of 2 7/8% per year—the same rate as the contract rate. The judgment also was expressly conditioned on its not being a waiver of the right to contend that neither the interest in default nor the interest on interest should be paid. (286a-87a; 181a-82a; A-12). Given the foregoing, bondholders simply did not have typical "judgment creditors rights" concerning interest.

Further, though the record is devoid of any evidence of a modification of bondholder rights, it is plain that Huiskamp and the other bondholders were "kept fully informed of developments" concerning bondholder rights and that his remedy was to object at the hearing approving the settlement. (A-14; see pp. 9 to 12 *supra*).

B. Identity of Parties Existed.

There is an identity of parties between this case, the Trustee's Suit and the settlement proceedings. "Generally speaking, one whose interests were adequately represented by another vested with the authority of representation is bound by the judgment, although not formally a party to the litigation."

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within the control of the Reorganization Court. (A-3 to 5). Third, Huiskamp's belated efforts to collaterally attack the jurisdiction of the Reorganization Court are improper. If he contested that court's jurisdiction, he should have done so at the hearing on the settlement. Moreover, approval of the settlement agreement was not "incidental" as Huiskamp suggests. (Petition at 11). Rather, that was the very core of the petition to the reorganization court to approve the settlement.

13 The issue of whether the settlement agreement somehow modified the rights of the bondholders or was improper under Article Seven, § 15 of the Trust Indenture was never raised in the district court and should not be considered now. *See* discussion at page 20 *infra*.

Expert Electric Inc. v. *Levine*, *supra*, 554 F.2d at 1233. *Accord*, *Chicago R.I. & P. RY. Co.* v. *Schendel*, 270 U.S. 611, 618 (1927); *Mother's Restaurant, Inc.* v. *Mamma's Pizza, Inc.*, *supra*, 723 F.2d at 1572; *Aerojet-General Corp.* v. *Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). Huiskamp was in privity with the Trustee in the Trustee's Suit because it was brought on behalf of all the bondholders.

Huiskamp contends that he "was clearly not present, therefore he would be bound only if the Trustee was a party entitled to represent him in [the proceedings before the Reorganization Court]". (Petition at 13). However, the Trustee was specifically authorized by Article Seven, Section 3 of the Trust Indenture to act on behalf of bondholders, such as Petitioner, in the event of default. (137a). Indeed, the Trustee's Suit was brought to protect bondholders by tolling the running of the applicable statute of limitations on the default. Huiskamp was well aware of the Trustee's Suit and the Trustee's actions on his behalf, but he never sought to intervene personally or to object to the Trustee's action.[14]

Huiskamp alternatively argues that there was a "conflict" in the Trustee's representation of tendering and non-tendering bondholders, because the settlement agreement protected those who tendered but eliminated "judgment creditor rights" of those who did not. (Petition at 14 and 15). No conflict existed. First, as seen above, the non-tendering bondholders lost no judgment creditor rights. Second, the Trustee protected non-tendering bondholders by giving them the option to recover from New York Connecting's claim in the Valuation Case.

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14 Huiskamp relies on *Robinson* v. *First National City Bank*, 482 F. Supp. 92 (S.D.N.Y. 1979), to argue that res judicata is inapplicable, but that case is inapposite. Unlike this case, the plaintiffs in *Robinson* were *not* authorized representatives and had no authority to bind a class of shareholders who were not present at the prior Penn Central reorganization proceedings. No class had been ceritified, so the absent class members received no notice of prior Penn Central reorganization proceedings in which the plaintiffs had individually asserted their claims. That is substantially different from this case in which the Trustee was authorized to act for bondholders by the Trust Indenture, and the bondholders received repeated notices and had opportunities to be heard.

Huiskamp consciously elected to risk this option, while the other members of his family who tendered did not. Third, his purported conflict issue lacks support: he had full notice of the terms of the settlement agreement and the tender offer and the option of not tendering to obtain a claim in the proceeds from the Valuation Case, but that he never objected or raised an issue of this newly claimed conflict.

Further, Huiskamp never raised these claims in either the district court or the court of appeals. They should not be entertained now. *Singleton* v. *Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976); *Hormel* v. *Helvering*, 312 U.S. 352, 556, 61 S. Ct. 719, 721 (1941). Huiskamp had every opportunity to raise issues in his pleadings and summary judgment submissions before the district court which had the entire record before it.

C. A Final Judgment Existed.

There unquestionably was a final judgment on the merits given the consent judgment and the district court's approval of the settlement agreement in Order No. 4003 into which the consent judgment was merged. (364a; see pp. 3-5, 6-9, 14, *supra*). It is well established that settlement agreements approved by the court have the same force and affect as final judgment on the merits and bar suits seeking to relitigate similar claims. *In re: Teltronics Services Inc.*, *supra* 762 F.2d at 190; *Belefonte Re Insurance Co.* v. *Argonaut Insurance Co.*, 581 F. Supp. 241, 243 (S.D.N.Y. 1984), *aff,d on other grounds*, 757 F.2d 523 (2d Cir. 1985); *Bostic Foundry* v. *Lindberg*, 797 F.2d 280, 283 (6th Cir. 1986).

D. An Opportunity to be Heard Existed.

Huiskamp had a full and fair opportunity to litigate the claims and question the prior action. For instance, on August 27, 1977, the Trustee invited bondholders to meet and discuss whether "concerted action" should be taken by the bondholders. (289a-92a; A-14). After describing the Trustee's Suit and the judgment of $21,274,989, the Trustee stated:

> There are many factual and legal uncertainties that exist in the Special Court and Bankruptcy Court proceedings. The amount to be received ultimately for the property taken by ConRail is wholly uncertain and may not be known for many years. The status of the lease between Connecting and Penn Central and the agreement by which Penn Central has guaranteed payment of the Bonds has yet to be determined. The status of Connecting bondholders under the Proposed Plan of Reorganization is unclear. If the holders of twenty five percent (25%) in original principal amount of Bonds so request, the Trustee will call a bondholders meeting so that the bondholders may discuss the issues and *determine if concerted action on their behalf is appropriate* and the means of pursuing such action. If you desire such a meeting, please sign and return the enclosed form.

Huiskamp failed to attend or to be represented because his New York lawyer had a conflict in his schedule. (389a-90a; 635a).

Similarly, Huiskamp and his lawyer received notice of the hearing on the proposed settlement and failed to raise any objection. As the district court noted, "Plaintiff, whose attorney is his brother, was notified of the hearing on the proposed settlement agreement, and should have registered his objections, if any, at the time." (A-14).

Furthermore, Huiskamp received a copy of the tender offer but took no action. (263a-64a). Indeed, as the district court found "[a]t no time until after approval of the settlement agreement and implementation of the tender offer, did [Huiskamp] ever complain of the conduct of the indenture trustee or lodge any objection with this court." (A-14 and 15).

Finally, the district court held that: "[i]f some other alternative were deemed more equitable, that objection should have been raised at that time. After approval of the settlement agreement, and reliance thereon by so may parties, it would plainly be inappropriate to attempt to restructure the transaction". (A-16).

Huiskamp was properly precluded from raising the same claims in this case that were or could have been previously decided. " '[N]o significant harm flows from enforcing the rule that affords a litigant only one full and fair opportunity to litigate an issue, and . . . there is no sound reason for burdening the courts with repetitive litigation.' " *United States* v. *Mendoza*, *supra*, 464 U.S. at 159, 104 S. Ct. at 572, *quoting*, *Standefer* v. *United States*, 447 U.S. 10, 24 (1980).

CONCLUSION

Huiskamp's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit should be denied.

1. He fails to raise any important or significant federal issues as required by Rule 17.1.

2. The district court and court of appeals correctly applied the established common law standards for res judicata. Huiskamp's petition simply raises factual disputes with the

district court's findings, which were reached on the uncontroverted record.

Respectfully submitted,

Dated May 13, 1987

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